STATE OF MICHIGAN
IN THE SUPREME COURT

DIANE BUKOWSKI and
THE MICHIGAN CITIZEN,

Plaintiffs/Appellees,

S. Court No. 129409

Case No. COA # 256893
WCCC # 02-242574-CZ

v.

CITY OF DETROIT,

Defendant/Appellant.
_____/

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129409

BRIEF OF AMICUS CURIAE
MICHIGAN PRESS ASSOCIATION
IN RESPONSE TO REQUEST OF THE COURT

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STATEMENT OF JURISDICTIONAL BASIS

This Supplemental Brief is submitted pursuant to the Michigan Supreme Court Order dated December 8, 2006, in which the Court requested the parties to address whether the Michigan Court of Appeals erred in instructing the Wayne County Circuit Court, on remand, that the Freedom of Information Act "frank communications" exemption, MCL 15.243(1)(m), does not apply to communications that are no longer preliminary to an agency determination of policy or action, even if the communications were preliminary at the time they were made and the Court's order of January 5, 2007 granting the request of Michigan Press Association to appear as amicus curiae.

STATEMENT OF QUESTIONS PRESENTED

1. Does the phrase "are preliminary to a final agency determination of agency policy or action" unambiguously mean "are preliminary" and not "were preliminary at the time they were made"?

   Plaintiff-Appellees say "Yes."
   Defendant-Appellants say "No."
   The Michigan Court of Appeals said "Yes."

2. Did the Michigan Court of Appeals strictly and correctly construe the unambiguous words of the "frank communications" exemption in instructing the Wayne County Circuit Court, on remand, that the Freedom of Information of Act "frank communications" exemption does not apply to communications that are no longer preliminary to an agency determination of policy or action?

   Plaintiff-Appellees say "Yes."
   Defendant-Appellants say "No."
   The Michigan Court of Appeals said "Yes."

3. Does the Legislative History of the Freedom of Information Act demonstrate that the phrase "are preliminary to a final agency determination of agency policy or action" was consciously placed into the statute as a limitation on the "frank communications" exemption as a compromise between pro-disclosure and anti-disclosure arguments?

   Plaintiff-Appellees say "Yes."
   Defendant-Appellants say "No."

4. Under the FOIA, must documents, that were correctly withheld under an exemption to disclosure, be immediately disclosed once the exemption no longer applies?

   Plaintiff-Appellees say "Yes."
   Defendant-Appellants say "Yes."

INTRODUCTION

The Court has asked for memoranda of law on whether the:

> Freedom of Information Act "frank communications" exemption, MCL 15.243(1)(m), does not apply to communications that are no longer preliminary to an agency determination of policy or action, even if the communications were preliminary at the time that they were made. Order of the Supreme Court dated December 8, 2006.

The Court of Appeals has so held in this case. Bukowski v. City of Detroit, 2005 Mich App LEXIS 1340,

Section 13(1)(m) of the FOIA provides in pertinent part that a public body may exempt from disclosure :

> Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. *** MCL 15.243(1)(m).

This Court has defined a frank communication as follows:

> A] document is a "frank communication" if the trial court finds that it (1) is a communication or note of an advisory nature made within a public body or between public bodies, (2) covers other than purely factual material, and (3) is preliminary to a final agency determination of policy or action.
>
> *Herald Company, Inc. v. Eastern Michigan University Board of Regents,* 475 Mich 463, 475 (2006)

In other words the question asked by the Court is whether the third requirement that the document be preliminary to a final agency determination is

measured at the time of the creation of the document or at the time of the request for the document under the Freedom of Information Act.

Amicus curiae Michigan Press Association agrees with the Plaintiff and the Michigan Court of Appeals that Exemption (m) may be asserted by a public body only if the document is preliminary to a government decision at the time of the FOIA request. The language, "are preliminary" is in the present tense and thus should be read that way.

Here the question is asked with regard to the Shoulders' Report, an investigation by the Police Department of the City of Detroit into its own internal investigation of its officer Eugene Brown. Officer Brown was involved in several incidents which resulted in the death of three people. Internal investigations were conducted into Officer Brown's conduct by the Detroit Police Department. After public concern was expressed at the response of the Department to Officer Brown's actions, the Chief of Police asked that a respected commander of the Detroit Police force review those internal investigations.

The Shoulders' report is arguably not a preliminary report at all, but a post mortem on the actions of the Department after a fatal shooting by one of its officers. But be that as it may, when does the statute measure the preliminary nature of the report?

I. STANDARD FOR REVIEWING STATUTES:

This Court reviews questions of statutory interpretation *de novo*. To effectuate the intent of the Legislature, you must interpret every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or

surplusage. *Herald Company, Inc. v Eastern Michigan University Board of Regents,* 475 Mich 463, 475 (2006); *Federated Pub's v. City of Lansing,* 467 Mich. 98, 107 (Mich. 2002).

Furthermore, MCL 8.3a, the section of the Michigan Compiled Laws governing statutory construction, provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

Subsection (m) is written in the present tense which in its literal, plain meaning means that at the time of the FOIA request, the public body can only withhold interagency memoranda if they "are", not "were", preliminary to a government decision.

II. LEGISLATIVE HISTORY OF SUBSECTION (m).

Furthermore a review of the history of subsection (m) supports the conclusion that the legislature only meant to extend the deliberative process privilege to those documents which are preliminary to a government decision at the time of the FOIA request.

This exemption is a revision of the deliberative process privilege that existed in Michigan law prior to the adoption of the Freedom of Information Act. That privilege which was contained at MCL 24.222 as part of the Administrative Procedures Act was in turn a codification of the deliberative process privilege which courts had developed in litigation to prohibit disclosure of governments'

internal workings if it would harm the legislative process. This prior codification of the deliberative process exemption also mirrors the Federal FOIA exemption found at 5 USC 5(b)(5) i.e. both the Federal exemption and the former APA provision adopted the deliberative process privilege created by courts when discovery is sought in lawsuits against the government.

MCL 24.221 gave a right of inspection of certain specified documents belonging to state agencies to the public. However, the next section MCL 24.222 provided that Section 221 did not apply to:

> (b) Interagency or intra-agency letters, memoranda or statements which would not be available by law to a party other than an agency in litigation with the agency and which, if disclosed, would impede the agency in the discharge of its functions.

The right of public inspection of documents of state agencies was limited. And in particular documents that were deemed to be part of the deliberative process were limited to the privilege granted by the courts to government agencies in discovery requests in litigation, with the additional caveat that the release would not impede the agency in the discharge of its functions.

The Michigan Freedom of Information adopted in 1977 expanded the scope of the public's right of access to all governmental units including local units of government and expanded the definition of public document to all documents in the possession of the government at any level. The deliberative process privilege was also revised to permit more access by the public to the government's workings.

In fact, when House Bill 6085 was introduced in 1976 it contained no such exemption. To the contrary, it specifically provided for the full disclosure of "communications between public bodies and within public bodies, including drafts, notes, recommendations, and memoranda in which opinions are expressed or policies discussed or recommended." It eliminated the deliberative process privilege in the production of government documents to the public. See House Legislative Analysis – H.B.6085 (9-10-76) First Analysis, page 3. (Copy attached hereto as Exhibit A).

The Michigan freedom of Information was introduced because, according to the Legislative Analysis, some people thought that the access provided by the Administrative Procedures Act was "insufficient, unclear, and extremely unspecific. It is contended that in the interest of public participation in the governmental process, the sections of the [then] current Administrative Procedures Act dealing with public records should be . . . replaced by a new comprehensive 'freedom of Information' act which would specify, statutorily, the public's right of access of all public records, regardless of the level of government or bureaucracy within the state which is involved." And that is what H.B.6085 did.

This was not a change in the law that went unnoticed. In the list of objections to the bill was the comment that then current law contained in MCL 24.222(b) exempted internal memoranda as opposed to H.B. 6085 which declared them open. Several agencies objected to the bill's failure to grant a deliberative process exemption.

So on September 23, 1976, Representative F. Roberts Edwards offered an amendment to the bill by adding an exemption for "Communications between and within public bodies, including letters, memoranda, or statements, which reflect deliberative or policy-making processes and are not purely factual, or investigative matter." Representative Bullard who had introduced H.B. 6085 was not in favor of the amendment. See House Journal for September 23, 1976 attached as Exhibit B.

That proposed amendment was defeated.

However, two months later on November 22, 1976 Representative Edwards together with Representative Bullard, the original sponsor of the bill, proposed an amendment adding what is now subsection (m) which amendment was approved. See House Journal for November 22, 1976, attached as Exhibit C.

Thus when finally signed by the governor in 1977, the Freedom of Information Act included the language under consideration in this brief.

This language was a compromise. The language was more restrictive on public access than the original bill, but allowed the public more access than Section 222(b) of the APA to documents that reflect the governments' deliberative process. Thus, the new provision of the FOIA on documents reflecting the deliberative process, Section 13(1)(n) [now (m)] must be interpreted to provide more access to documents reflecting the deliberative processes of government, not less, if the legislature's intent is to be honored.

III. FEDERAL FOIA AND THE DELIBERATIVE PROCESS PRIVILEGE.

Subsection (m) is also contrary to the Federal FOIA provisions on documents reflecting the deliberative process. Essentially the old Section 222(b) of the APA right of public access followed the case law on the deliberative process privilege. It adopted the case law limiting discovery of documents that revealed the deliberative process developed by the courts in litigation, exempting interagency communications that would "not be available by law to a party other than an agency in litigation."

This old APA view of the deliberative process privilege was also consistent with the Federal Freedom of Information Act, 5 USC 552(b)(5). Unlike other provisions of FOIA, the interagency/intraagency deliberative process privilege in the Federal FOIA is very different from the Michigan FOIA. The Federal FOIA is similar to the old APA provision on access to interagency deliberations which the Michigan legislature specifically rejected. The Federal FOIA provides for public access to government documents but in its list of exemptions it provides:

> b) This section does not apply to matters that are--
>
> * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

Thus the Federal FOIA is similar to the old APA section and not to the current section of FOIA on interagency communications. Thus, federal case law can be helpful in determining what the Michigan legislature adopted and what they declined to adopt.

As noted in *Michigan Council of Trout Unlimited v Department of Military Affairs, 213 Mich App 203, 208; 539 NW2d 745 (1995),* the Federal FOIA provision is taken from the privilege recognized by the courts in discovery proceedings in litigation.

The policy underlying the privilege is explained in *Jordan v Dep't of Justice*, 192 US App DC 144, 163-164; 591 F2d 753 (1978):

> This privilege protects the 'consultive functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' The privilege attaches to inter- and intraagency communications that are part of the deliberative process proceeding the adoption and promulgation of an agency policy. There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided[,] not for matters they considered before making up their minds. Id at 208.

See also, *Ostoin v. Waterford Township Police Department,* 189 Mich App 334, 471 NW2d 666, (1991)

In the case of *Coastal States v. Dept. of Energy, (CA DC 1980) 617 F2d 854, 54 ALR Fed 256,* the D.C. Court of Appeals described the Federal exemption as cast in terms of discovery law. "The agency need turn over no documents 'which would not be available by law to a private party in litigation with the agency.'" The court stated that Exemption 5 of the federal FOIA

includes three types of material: material subject to the (1) attorney-client privilege, (2) attorney work-product and (3) materials covered by the executive deliberative process privilege.

In turn the court discussed that the deliberative process privilege is meant to do three things: make subordinates within an agency feel free to provide the decision maker with uninhibited opinions, **to protect against premature disclosure of the proposed policies before they have been finally formulated** and to protect against confusing the issue and misleading the public by dissemination of documents suggesting reasons and rationales for a courts of action which were not in fact the ultimate reasons for the agency's actions.

It would appear that the Michigan legislature ultimately chose to limit the deliberative process exemption only to the second of these purposes. Instead of allowing full public access to all agency deliberative documents, as HB 6085 originally proposed or limiting access as in Federal FOIA Section 5 and the old APA to those deliberations of government allowed in litigation, it chose to limit public access only to preliminary deliberation while they are preliminary to a final agency decision, but not to the documents once the decision is made.

The Michigan exemption is a compromise provision only applying to documents reflecting the deliberative process **when** they "are" preliminary to a final agency decision, not after the decision has been made.

This is consistent with the intent of the legislature as set forth in the original Legislative Analysis to alter the public right of access under the APA because the legislature found the old provisions to be "insufficient, unclear, and

extremely unspecific. It is contended that in the interest of public participation in the governmental process, the sections of the [then] current Administrative Procedures Act dealing with public records should be ... replaced by a new comprehensive 'freedom of Information' act which would specify, statutorily, the public's right of access of all public records, regardless of the level of government or bureaucracy within the state which is involved." (Exhibit A)

More importantly it is consistent with the purpose clause of the FOIA.

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.
>
> MCL 15.231(2).

If the legislative intent in Section 1 of the FOIA is to be believed, then surely this court must affirm the decision of the Court of Appeals. Limiting the deliberative process exemption to documents only during the time prior to the decision means that citizens will get full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees. That is what the legislature called for in its purpose clause. That is what the Court of Appeals held and what this court should affirm.

CONCLUSION

Thus, whether one reads the clear language of the statute or looks to its legislative history, the conclusion is inescapable that the legislature intended to expand the public's right of access to all public documents. Therefore, exemption (m) should be interpreted to apply to documents only when they are preliminary in nature at the time of the request under the Freedom of Information Act.

Wherefore, amicus curiae, Michigan Press Association, requests this court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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